80-5757

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

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SUPREME COURT, U.S.

FREDDIE F. DAVIS, Petitioner,

vs.

STATE OF GEORGIA, Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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November 21, 1980

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IN THE

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No. 80-

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FREDDIE F. DAVIS,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

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# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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Petitioner, Freddie F. Davis, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia affirming his sentence of death for murder.

## OPINIONS BELOW

The first opinion of the Supreme Court of Georgia which reversed the imposition of the death penalty on petitioner is reported at 240 Ga. 763, 243 S.E.2d 12 (1978). The second opinion of the Supreme Court of Georgia affirming petitioner's conviction and death penalty after the re-sentencing by a jury is reported at 242 Ga. 901, 252 S.E.2d 443 (1979). On May 27, 1980, this Court entered the following order in Davis v. Georgia, No. 78-6891:

> The motion of petitioner for leave to proceed in forma pauperis and the petition for Writ of Certiorari is granted. The judgment is vacated insofar as it leaves undisturbed the death penalty imposed and the case is remanded to the Supreme Court of Georgia for further consideration in light of Godfrey v. Georgia.

The third opinion of the Supreme Court of Georgia which reimposed the death penalty, is not yet reported and a copy of the slip opinion is attached hereto as Appendix A.

## JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3). The judgment of the Supreme Court of Georgia was entered on September 24, 1980.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

AMENDMENT VIII, UNITED STATES CONSTITUTION:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

AMENDMENT XIV, UNITED STATES CONSTITUTION:

> ...no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GEORGIA CODE ANNOTATED SECTION 27-2534.1:

> ...in all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:...(2) the offense of murder...was committed while the offender was engaged in the commission of another capital felony...(7) the offense of murder...was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.... The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt....

## QUESTIONS PRESENTED

1. Whether the procedures employed on remand by the Georgia Supreme Court to reimpose a death sentence on petitioner violated his sixth, eighth, fourteenth amendment rights.

2. Whether the Georgia Supreme Court has either construed or applied Ga. Code Ann. §27-2534 1(b) (7) in an unconstitutionally vague or overbroad manner in petitioner's case.

3. Whether the petitioner was twice put in jeopardy and denied due process by the addition of a new accusation of "aggravating circumstances" after the first reversal by the Georgia Supreme Court.

4. Whether the jury instructions approved by Georgia's Supreme Court are flatly inconsistent with this court's recent rulings as to when a death sentence may constitutionally be imposed.

## STATEMENT OF THE CASE

The charge for which petitioner was arrested, tried, and convicted and sentenced to death was that he acted in concert with Eddie Spraggins to rape and murder Frances Coe. The Supreme Court of Georgia affirmed the murder conviction and rape conviction in 1978 but vacated and reversed the imposition of the sentence of death as a result of inadequate jury instructions.[1]

At petitioner's first sentencing trial, the state alleged only the "aggravating circumstance" of "commission of an additional capital felony, to wit, the rape of Frances Coe"[2] and on that basis, the jury recommended a death verdict. After reversal of the death sentence on direct appeal, Davis v. State, 240 Ga. 763, 243 S.E. 2d 12 (1978), at the new sentencing trial, the state added the allegation of "aggravating circumstances" that the offense was "outrageous, wantonly vile, inhuman and involved torture and depravity of mind...and aggravated battery...."[3] Adding this second allegation involved no new evidence and in fact resulted in the use of the same witnesses and same testimony as at the first trial.[4] No reason of any kind appears in the record for the addition of this new, second allegation of "aggravating circumstances" at the resentencing trial.

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[1]Petitioner received a life sentence for the rape conviction.

[2]Page 283 of transcript of first trial in 1977. (hereinafter referred to as "Tr.").

[3]Page 363 of transcript of re-sentencing trial in 1978 (hereinafter referred to as "2d Tr.").

[4]"Because the evidence which was presented at the trial for re-sentencing is identical to that which this court previously considered in 240 Ga. 762 Appellee will not endeavor to set forth that evidence on appeal." Brief on Behalf of Appellee by the Attorney General. p. 2.

The jury instructions on sentencing and the death penalty[5] gave no examples of "mitigation"; did not attempt to define or explain the "outrageous, wantonly vile..." instruction; asked the jury only to "recommend"; and contained the other defects discussed infra.

During presentation of the evidence, the investigating police officer was allowed to testify concerning three statements given by the petitioner. The first statement was given at home - petitioner was not a suspect supposedly - and no warnings of constitutional rights were given.[6] The second statement was taken at the police station[7] when obviously the police did not believe the first statement. No warnings of constitutional rights were given the defendant until after he made this second statement.[8] In this statement, petitioner admits going to the home of the deceased with the co-defendant Spraggins knowing that a robbery was planned; admits an assault on the deceased by Spraggins; admits knowledge of sexual assault; and gives the police knowledge of physical evidence which is used at the trial.[9] Constitutional warnings were given before the third statement where petitioner admitted killing the deceased but these warnings were incomplete.[10]

All three of the statements by petitioner were used in evidence against petitioner at the re-sentencing trial.[11]

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[5] 2d Tr. pp. 353-362.

[6] 2d Tr. p. 147.

[7] 2d Tr. p. 148.

[8] 2d Tr. pp. 149, 142.

[9] 2d Tr. pp. 149-150.

[10] 2d Tr. p. 152.

[11] 2d Tr. pp. 142, 147, 149-152.

Based on the above, the re-sentencing jury "recommended" death and petitioner was sentenced to death.[12]

The Supreme Court of Georgia affirmed the death sentence. The Supreme Court of Georgia decided and rejected the double jeopardy/due process arguments, the Miranda warnings argument and the arguments concerning the death penalty and the jury instructions.[13]

Original counsel for petitioner then withdrew or declined to continue his representation and present counsel for petitioner was obtained at the request of petitioner through the assistance of the NAACP Legal Defense and Educational Fund, Inc.

This Court granted certiorari and on May 27, 1980 remanded the case to Georgia in light of Godfrey v. Georgia, ___U.S. ___, 100 S.Ct. 1759 (1980). Petitioner filed a timely written motion for full briefing and oral argument with the Georgia Supreme Court on or about June 20, 1980 and this motion was denied. A copy of the motion and transmittal letter is attached as Appendix B. Petitioner's death sentence was reimposed by the Supreme Court of Georgia in an opinion filed September 24, 1980.

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[12] 2d Tr. pp. 363-364.

[13] 252 S.E.2d 443.

## REASONS FOR GRANTING THE WRIT

In 1972, this Court held that death penalty statutes, as then administered, were unconstitutional. Furman v. Georgia, 408 U.S. 238. In 1976, this Court ruled that, while some new death penalty statutes were unconstitutional, e.g., Woodson v. North Carolina, 428 U.S. 280, others, including Georgia's appeared on their face to contain sufficient safeguards so that they could be applied constitutionally, e.g., Gregg v. Georgia, 428 U.S. 153. In Godfrey v. Georgia, ___ U.S. ___ 100 S.Ct. 1759 (1980) this court held that a death sentence based upon a finding of aggravating circumstances defined by Georgia Code Annotated section 27-2534.1 (b) (7) cannot stand consistent with the Eighth and Fourteenth Amendments unless limiting construction is placed upon section (b) (7) by the jury instructions which suffices to "channel the sentencer's discretion by 'clear and objective' standards that provides 'specific and detailed guidance'." Petitioner's case was remanded to the state courts for further consideration in light of Godfrey v. Georgia. On remand, the Georgia Supreme Court reimposed the death penalty.

This case also raises important questions as to the application and interpretation of Hicks v. Oklahoma, ___ U.S. ___ 100 S.Ct. 2227 (1980). In Hicks, this Court held that a defendant has a legitimate expectation and fundamental right to have his case determined by a jury that is properly instructed under proper law. The ruling in Godfrey v. Georgia makes it clear that the jury in petitioner's case was not properly instructed under proper law.

Finally, this case raises important questions of double jeopardy/due process with respect to a new death sentencing trial

for this petitioner when his original death sentence was reversed by the Georgia Supreme Court for improper jury instructions and only at the second sentencing trial by a jury was the (b) (7) aggravating circumstances used.

## REASONS FOR GRANTING THE WRIT

### I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PROCEDURES EMPLOYED ON REMAND BY THE GEORGIA SUPREME COURT TO REIMPOSE A DEATH SENTENCE ON PETITIONER VIOLATED HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

#### A. The Georgia Supreme Court Should Not Have Acted as a Sentencing Authority to Reimpose Petitioner's Death Sentence.

In remanding petitioner's case "for further consideration in light of Godfrey v. Georgia," the court did not designate the appropriate party to decide whether Ga. Code Ann. §27-2534 1(b)(7), as clarified by Godfrey, actually fit the facts of petitioner's case. The court, in other words, did not resolve the question who should serve as petitioner's sentencing authority on remand.

Mr. Justice Marshall's concurrence in Godfrey strongly suggested that a trial jury must perform that task:

> It is not enough for a reviewing court to apply a narrowing construction to otherwise ambiguous statutory language. The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the sentencer's discretion that must be channeled and guided by clear, objective, and specific standards.

Godfrey v. Georgia, supra, 64 L.Ed.2d at 411 (emphasis in original). Mr. Justice Stewart's opinion for the Godfrey plurality, on the other hand, could be read to imply - though it did not hold[14] - that if "the Georgia Supreme Court can be said to have applied a

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[14] Indeed, the plurality insisted that "if a state wishes to authorize capital punishment...it must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death'." Godfrey v. Georgia, supra, 64 L.Ed.2d at 406.

constitutional construction" of subsection (b) (7), Godfrey v. Georgia, supra, 64 L.Ed.2d at 409, any deficiency at the trial jury level could be overcome.

On remand in this case, the Georgia Supreme Court did not remit petitioner's case to a trial jury for redetermination of sentencing issues under a narrow construction of subsection (b) (7). The Georgia court did not designate itself as the trier of petitioner's sentencing issues. Instead the Georgia Supreme Court tried to dodge the ultimate issue by holding that petitioner's jury was authorized to find:

> consistently with the United States Supreme Court's holding in Godfrey, that beyond a reasonable doubt the murder of the victim was of the type universally condemned by civilized society as 'outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind.'

Davis v. State, supra, (slip opinion at 4-Appendix A).

Since petitioner's trial did not, however, have the benefit of Godfrey or of any other narrowing instructions on subsection (b) (7), it is "impossible for (the Georgia Supreme Court) to say whether a particular jury...so exercised its discretion, "Godfrey v. Georgia, supra, 64 L.Ed.2d at 912. Nothing in the sentencing instructions given petitioner's jury "implie(d) any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible or inhuman'. Such a view may, in fact, have been one to which the members of the jury in this case subscribed". Godfrey v. Georgia, supra, 64 L.Ed.2d at 406.

In an unbroken series of cases, this court has insisted that no criminal sentence may be upheld merely on the basis of

appellate speculation that a jury, faced with two alternative theories, one of which is unconstitutional, might have acted on a constitutional basis. Stromberg v. California, 283 U.S. 359, 368 (1931); Williams v. North Carolina, 317 U.S. 287, 291-93 (1942); Cramer v. United States, 325 U.S. 1, 36 n.45 (1945); Terminiello v. Chicago, 337 U.S. 1, 5-6 (1949); Yates v. United States, 354 U.S. 298, 311-12 (1957); Gregory v. Chicago, 394 U.S. 111, 113 (1969); Street v. New York, 394 U.S. 576, 586-87 (1969); Bachellar v. Maryland, 397 U.S. 564, 569-71 (1970); Eaton v. Tulsa, 415 U.S. 697, 698-99 (1974) (per curiam); Sandstrom v. Montana, 442 U.S. 510, 526 (1979); Chiarella v. United States, ___ U.S. ___, 63 L.Ed.2d 348, 362 n.21 (1980).

This principle has been scrupulously observed in death cases, where the court has insisted that all "doubts...should be resolved in favor of the accused". Andres v. United States, 333 U.S. 740, 752 (1948); accord, Calton v. Utah, 130 U.S. 83, 86-87 (1889).

Furthermore, just as the verdict announced by petitioner's original trial jury afforded no constitutional foundation on which to reimpose a death sentence, neither could the Georgia Supreme Court, acting on its own, have constitutionally reimposed such a sentence simply from its own review of the trial record. "To conform to due process of law, petitione(r) (was) entitled to have the validity of (his) conviction appraised on consideration of the case as it was tried and as the issues were determined in the trial court". Cole v. Arkansas, 333 U.S. 196, 201 (1948); accord, Chiarella v. United States, supra, 63 L.Ed.2d at 363; Shuttlesworth v. Birmingham, 382 U.S. 87, 91-92 (1965). This "fundamental principle of procedural fairness applies with no less force at the penalty phase of a trial in a capital case

than...in the guilt-determining phase of any criminal trial. Cf. Gardner v. Florida, 430 U.S. 349 (1977)" Presnell v. Georgia, 439 U.S. 14, 16 (1978). The Georgia Supreme Court's attempt to reassess petitioner's sentencing issues, relying only upon a cold record, and in absence of statutory authority,[15] plainly denied petitioner the due process of law.

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[15] The Supreme Court of Georgia is charged under Ga. Code Ann. §27-2537 with appellate review of sentences imposed by the trial court. No statutory provision gives that court power to act as a sentencing authority de novo in a capital case.

B. The Georgia Supreme Court Erred by Denying Petitioner Any Opportunity to be Heard Concerning the Reimposition of His Death Sentence.

Even if the Supreme Court of Georgia, acting independently of a trial jury, could itself properly have reimposed a death sentence after a full hearing, its decision to deny petitioner any opportunity to present briefs or oral argument during the proceeding which determined his sentence is manifestly unconstitutional. Had his case been remitted to the trial court, this court is aware from its review of Georgia capital procedures in Gregg v. Georgia, 428 U.S. 153, 163-66, 196-97, 207-11 (1976) that petitioner would have been afforded an array of procedural rights including the right to introduce sentencing evidence,[16] the right to present closing arguments,[17] and the right to have his sentence determined by a jury,[18] which would have been charged by the trial court to consider not only any aggravating circumstances, but mitigating circumstances as well, and to weigh all factors in considering whether a death sentence should be imposed.[19]

In addition, petitioner would have had the right to an automatic review of his sentence,[20] encompassing the right to submit briefs[21] and mandatory oral argument before the Georgia Supreme

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[16] Ga. Code Ann. §27-2503(b).

[17] Ibid.

[18] Ibid.

[19] Ibid. Ga. Cod Ann. §27-2534. 1(b) and (c).

[20] Ga. Code Ann. §27-2537.

[21] Rules 39 and 41, Rules of the Supreme Court of Georgia (effective August 1, 1979).

Court.[22] In petitioner's case, however, the Georgia Supreme Court's unilateral review of the record constituted petitioner's only "resentencing hearing," and none of these basic procedural rights were afforded him.

The court needs no reminder that the capital "sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause", Gardner v. Florida, 430 U.S. 349, 358 (1977); accord, Green v. Georgia, 442 U.S. 95, 97 (1979). The right to due process of law surely numbers "a chance to be heard (as)...among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal". Cole v. Arkansas, 333 U.S. 196, 201 (1948). Fundamental fairness in any sort of proceeding is denied unless, "'at a minimum (the)... deprivation of life, liberty or property by adjudication (is)... preceded by notice and opportunity for hearing appropriate to the nature of the case'". Goss v. Lopez, 419 U.S. 565, 579 (1975), quoting Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950). See Willner v. Committee on Character and Fitness, 373 U.S. 96, 105 (1963); FTC v. National Lead Co., 352 U.S. 419, 427 (1957); Morgan v. United States, 304 U.S. 1, 18-19 (1938); Grannis v. Orlean, 234 U.S. 385, 394 (1914).

In addition to these basic due process rights, the "qualitative difference" under the Eighth Amendment between death and any other punishment requires "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case". Woodson v. North Carolina, 428 U.S. 280, 305 (1976); see also, Lockett v. Ohio,

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[22] Rule 54, Rules of the Supreme Court of Georgia (effective August 1, 1979).

438 U.S. 586, 601 (1978); cf. Beck v. Alabama, ___ U.S. ___, 65 L.Ed.2d 392, 403 (1980). Yet petitioner was granted no opportunity to inform the sentencing authority "not only why a death sentence should be imposed, but also why it should not be imposed". Jurek v. Texas, 428 U.S. 260, 271 (1976).

Other important rights were compromised as well by the Georgia Supreme Court's unilateral action. The Sixth and Fourteenth Amendments entitle every defendant to the effective assistance of counsel, both in sentencing proceedings, Mempha v. Rhay, 389 U.S. 128 (1967); Townsend v. Burke, 334 U.S. 736 (1948) as well as on appeal, Douglas v. California, 372 U.S. 353 (1963). Since effective assistance can be denied not only by outright exclusion of counsel from the criminal process but also by placing "restrictions upon the function of counsel in defending a criminal prosecution in accord with the tradition of the adversary fact-finding process Herring v. New York, 422 U.S. 853, 857 (1975); accord, Ferguson v. Georgia, 365 U.S. 570 (1961); Brooks v. Tennessee, 406 U.S. 605 (1972), a proceeding in which counsel for petitioner was given no "chance to marshal the facts in his favor," Wolff v. McDonnell, 418 U.S. 539, 564 (1974), or "to comment on facts which may influence the sentencing decision," Gardner v. Florida, 430 U.S. 349, 360 (1977), necessarily denied him any effective legal representation.

In sum, "the failure to accord (petitioner) a fair hearing violated even the minimal standards of due process". Groppi v. Wisconsin, 400 U.S. 505, 509 (1971); In re Oliver, 333 U.S. 257, 273 (1947). In this capital case, it is a failure which ought not be disregarded.

C. The Additional Aggravating Circumstance Other than (b) (7) Does Not Immunize Petitioner's Death Penalty Verdict.

This Court's decision in Hicks v. Oklahoma, ___ U.S. ___, 100 S.Ct. 2227 (1980) makes clear that petitioner's constitutional right to due process will be violated if petitioner's death penalty verdict is upheld since it was returned by a jury whose instructions were constitutionally deficient under Godfrey v. Georgia, supra. A habitual offender statute was reviewed in Hicks and this Court held that a defendant has a legitimate expectation and fundamental right to have any depravation of his/her liberty (and therefore his/her life) determined by a jury that is properly instructed under proper law. Furthermore, the imposition of a sentence by a jury that is not properly instructed was held to be a violation of due process. Such a constitutional infirmity exists regardless of any "frail conjecture that a jury might have imposed a sentence equally as harsh..." after receiving proper instructions. Hicks v. Oklahoma at 2229.

Pursuant to Georgia statutes, a sentencing jury makes its life or death decision after a deliberative process in which each and every aggravating circumstance may tip the delicate balance. If a death sentence is returned, the part played in that decision by any single aggravating circumstance which the jury found "can only be the subject of sheer speculation". Godfrey v. Georgia, ___ U.S. _____, 100 S.Ct. 1764 (1980). Under this scheme, the function of the statutory definition of aggravating circumstances is to direct the jury's attention to the relevant factors. Gregg v. Georgia, 428 U.S. 153, 197, 206. A life sentence may be recommended even if two, three, four or even five aggravating circumstances are found. One or more

aggravating circumstances is enough to permit a death sentence but no particular number requires a death sentence.

A death verdict should be set aside when it is based on a section (b) (7) finding regardless of other aggravating circumstances where the jury was not properly instructed. This Court has recognized this much by vacating and remanding reconsideration in light of Godfrey at least three cases in addition to petitioner's where aggravating circumstances in addition to (b) (7) were found. Baker v. Georgia, 243 Ga. 710, 257 S.E.2d 192 (1979), rev'd 48 L.W. 3769 (May 27, 1980); Collins v. Georgia, 243 Ga. 291, 253 S.E.2d 727 (1979) rev'd 48 L.W. 3769 (May 27, 1980); Brooks v. Georgia, 244 Ga. 574, 261 S.E.2d 379 (1979) rev'd L.W. 3769 (May 27, 1980). Such a result should also be found under the long established constitutional rule that any ambiguity as to whether a judgment rests upon a constitutionally unsound basis requires its reversal. See, e.g., Shuttlesworth v. Birmingham, 382 U.S. 87 (1965). The jury's sentencing decision should be presumed to have been affected by the state's charge. Andres v. United States, 333 U.S. 740, 752 (1948).

On remand in this case, the Georgia Supreme Court imposed the death penalty once again on petitioner on the alternative ground that it could be upheld under (b) (2) relying upon Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979) and Burger v. State, 245 Ga. 458, 265 S.E.2d 296 (1980). Neither of these cases discussed or even considers the possibility of constitutional error arising from an erroneous construction on one of several aggravating circumstances in a death penalty case. The Georgia Supreme Court merely assumes that the jury would have imposed the death penalty even if only one of the aggravating circumstances in the case was proved. However, even under Georgia

law, the trial court must make clear to the jury that it can recommend a sentence of life imprisonment even it finds the existance of one or more statutory aggravating circumstances. Burger v. State, 242 Ga. 28, 237 S.E.2d 834.

Substantially the same problem was faced in the Supreme Court of North Carolina in State v. Cherry, 257 S.E.2d 551 (1979). In Cherry the jury was instructed on several aggravating circumstances including that the murder was committed while perpetrating another serious felony. This factor was the reason the defendant was eligible for the death penalty and the Court held that this felony could not be considered an aggravating circumstance:

> Had the jury not considered the underlying felony as an aggravating circumstance, it may well have decided that the remaining aggravating circumstances were not sufficiently substantial to call for imposition of the death penalty. State v. Cherry at 568.

Both the fundamental principles of procedural fairness under Hicks and the established rule of reversal where there is ambiguity surrounding the basis of a judgment should apply with added force in this case. There is a heightened "need for reliability in the determination that death is the appropriate punishment in a specific case....". Woodson v. North Carolina, 428 U.S. 280, 305 (1976). This Court has repeatedly held that it is intolerable to carry out a death sentence where there is any ambiguity in the record as to whether constitutional requirements for capital punishment have been observed. See, e.g., Witherspoon v. Illinois, 391 U.S. 510, 522 n. 21 (1968).

Finally, for the Georgia Supreme Court to reimpose the death penalty in reliance upon the jury finding the (b) (2) aggravating circumstance of the murder having been committed during the commission of another felony, to wit: rape raises serious question under Coker v. Georgia, 433 U.S. 603 (1977).

In Coker, this Court held the sentence of death grossly disproportionate and excessive punishment for the crime of rape. In fact, the petitioner in Coker also received death from a jury which found the presence of the (b) (2) aggravating circumstance as well as one other statutory aggravating circumstance. Coker v. Georgia, 433 U.S. 584, 589-590.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE GEORGIA SUPREME COURT HAS EITHER CONSTRUED OR APPLIED GA. CODE ANN. §27-2534 1(b) (7) IN AN UNCONSTITUTIONALLY VAGUE OR OVERBROAD MANNER IN PETITIONER'S CASE.

This court in Godfrey vacated a death sentence because it determined that the Georgia Supreme Court had applied one of its statutory aggravating circumstances in a vague and overbroad fashion.

The court also vacated petitioner's death sentence as well as those of five other Georgia capital inmates, inviting the Supreme Court of Georgia to reconsider its holdings in each case in light of Godfrey. However, the Georgia court has instead chosen on remand to interpret Godfrey in an extremely narrow way, confining Godfrey's apparent reach to the peculiar facts of the case. Thus, petitioner's death sentence was reinstated after the following assessment by the Georgia Supreme Court:

> Unlike the murder in Godfrey, death was not instantaneous, the victim was not related to either defendant, and the victim was in no way threatening nor hostile to the defendants.

Davis v. State, supra, slip opinion at 2. See, Baker v. State, supra, slip opinion at 2. ("The evidence in this case shows that, unlike Godfrey, the victim was not killed instantaneously, he was not a member of the appellant's family, nor was he threatening the appellant in any manner.") Brooks v. State, supra, slip opinion at 2 ("In the present case, the victim died, not instantaneously, but a full 2 hours after being shot in the neck and abandoned by the appellant") Collins v. State, supra, slip opinion at 1 ("This court fihds material

differences...which distinguish this murder from the murder in Godfrey and from other "ordinary" murders for which the death penalty is not appropriate...the victim was not related to the appellant...was not threatening the appellant nor was she causing any emotional trauma to him...appellant left the scene and attempted in every manner to avoid prosecution..."). Hamilton v. State, supra, slip opinion at 2 ("Unlike the murder in Godfrey, death was not instantaneous, the victim was not related to the defendant, and the victim was in no way threatening nor hostile to the defendant.")

In emphasizing the factual peculiarities of Godfrey, the Georgia Supreme Court has ignored Godfrey's central teaching-that any state which determines to impose capital punishment "has a constitutional responsibility to tailor and apply its laws in a manner that avoids the arbitrary and capricious infliction of the death penalty", Godfrey v. Georgia, supra, 64 L.Ed2d at 406. In fact, the rash of affirmances by the Georgia court since Godfrey on (b) (7) grounds,[23] a number of them highly questionable, makes it difficult to deny Mr. Justice Marshall's suggestion that the Georgia Supreme Court's decision in Godfrey involved not "an aberrational lapse...from an ordinarily narrow construction of § (b) (7)," Godfrey v. Gerogia, supra, 64 L.Ed.2d but instead an aggravating circumstance which has been "defined... so broadly that practically every murder fit within its reach," id. at 414, thereby violating the Eighth Amendment and the due process clause of the Fourteenth Amendment.

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[23] Beyond the five "Godfrey remand" cases cited at page 8 supra, the Georgia Supreme Court has examined and affirmed on (b) (7) grounds at least four other cases on subsection (b) (7) grounds since Godfrey. Mulligan v. State, ___ Ga. ___, 268 S.E.2d 351 (1980); Fair v. State, ___ Ga. ___, 268 S.E.2d 316 (1980); Hance v. State, ___ Ga. ___, 268 S.E.2d 339 (1980); Dampier v. State, ___ Ga. ___, 268 S.E.2d 349 (1980).

If the requirements of Furman v. Georgia, 408 U.S. 238 (1972), Gregg v. Georgia, 428 U.S. 153 (1976), and Godfrey v. Georgia, supra, are to be honored other than in the breach, this court should grant certiorari to consider whether the Georgia Supreme Court's application of subsection (b) (7) to the facts of petitioner's case violated his Eighth and Fourteenth Amendment rights.

III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PETITIONER WAS TWICE PUT IN JEOPARDY AND DENIED DUE PROCESS BY THE ADDITION OF A NEW ACCUSATION OF "AGGRAVATING CIRCUMSTANCES" AFTER THE FIRST REVERSAL BY THE GEORGIA SUPREME COURT.

By allowing the state to add a new allegation of aggravating circumstances at the re-sentencing trial in 1978, the trial court allowed an attempt to appeal to the passion and prejudice of the jury and allowed the state to punish the petitioner for pursuing his original appeal.

The common law prohibited a second punishment for the same offense as well as forbidding a second trial for the same offense. Ex parte Lange, 18 Wall. 163, at 169. This Court has long held that under certain circumstances a defendant may be re-tried after a reversal of his conviction, Ball v. United States, 163 U.S. 662.[24] However, due process compels that a trial court not allow vindictive deterrence of appeals by permitting the state to deliberately seek enhancement at sentencing:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation... North Carolina v. Pearce, 395 U.S. 711.

The same considerations as were applicable in Ashe v. Swenson, 379 U.S. 436 also indicate here that the state's addition of another "aggravating circumstance" should not be allowed. An examination of the record of the first trial and a comparison of the record at the second trial reveals the state to have used the same evidence and same witnesses at both

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[24] But see Burkes v. United States, 473 U.S. 1 and Greene v. Massey, 437 U.S. 19.

proceedings - a fact admitted by respondent. They simply added the "outrageous, wantonly vile..." allegation the second time around for good measure in order to justify a reconsideration of evidence that did not and could not relate to the commission of another capital offense factor which was used the first time. The state of Georgia should not be allowed to stack the deck in this fashion in order to obtain a death verdict.

The burden of persuasion as to whether legitimate reasons existed at the re-sentencing trial for adding the new accusation - or whether it was simply a punitive measure to allow use and introduction of evidence to appeal to the passion and prejudice of the jurors - rests upon the state. Only the prosecutor was in a position to know and reveal why the new accusation was added after the successful appeal. Due process should command that affirmative reasons appear in the record when petitioner's life is at stake - just as is required when a judge chooses to impose a different and harsher sentence upon re-trial. North Carolina v. Pearce, 395 U.S. 711.

IV.

THE JURY INSTRUCTIONS APPROVED BY GEORGIA'S SUPREME COURT ARE FLATLY INCONSISTENT WITH THIS COURT'S RECENT RULINGS AS TO WHEN A DEATH SENTENCE MAY CONSTITUTIONALLY BE IMPOSED.

It is "quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." Gregg v. Georgia, 428 U.S. 153, 193 (1976). In death cases, moreover, as this Court recognized long before its wider rulings in Furman, doubts about the clarity of instructions should be "resolved in favor of the accused". Andres v. United States, 333 U.S. 740, 752 (1948). See also Calton v. Utah, 130 U.S. 83, 87 (1889) ("fundamental" in cases involving death that instructions be clear and explicit).

Although criminal defendants are entitled to instructions clear to laypersons as well as legal scholars, Taylor v. Kentucky, 436 U.S. 478, 484 (1978), it is particularly true in death cases that instructions should be (as Mr. Justice Frankfurter put it) in clear "simple colloquial English", and (as then Chief Judge Cardozo wrote) given "directly and not in a mystifying cloud of words".[25]

The instructions below do not pass those general tests. More specifically, they depart in four separate but reinforcing respects from the very elements of the Georgia statutory scheme which this Court in Gregg held saved that scheme from constitutional attack.

A. The Jury Was Not Told Its Decision on Life or Death Must Include Focus on the Particular Characteristics of the Defendant.

The instructions leading to the death verdict against petitioner did not clearly express the need to weigh the

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[25] The first quote is in the Justice's concurring opinion in Andres, 333 U.S. at 766; the second from Law and Literature (1931) cited in McGautha v. California, 402 U.S. 183, 199 (1971).

petitioner's particular characteristics, as well as the specific circumstances of the crime. Thus, they conflict with:

(i) Gregg and the other 1976 decisions holding that certain death penalty statutes can, if properly administered to focus on the individual defendant, meet the requirements of the Constitution;[26]

(ii) Woodson and the other 1976 decisions holding mandatory death penalty statutes unconstitutional because they exclude consideration of mitigating factors and the circumstances of the defendant;[27] and

(iii) Lockett v. Ohio, which held that in death cases the sentencing authority must be given a "full opportunity" to consider "mitigating circumstances", including "any aspects of the defendant's character and record". 98 S. Ct. 2954.

B. The Term "Mitigating" was not Sufficiently Defined for the Jury and Concrete Examples of Mitigating Circumstances were not Provided.

The only attempt at any explanation by the trial court to guide and direct the jury on the meaning and definition of the term "mitigating" was the following:

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[26] E.g.:
(i) In Gregg, this Court emphasized the constitutional obligation to focus specifically on the defendant in at least six places in the plurality opinion. 428 U.S. at 189-90, 190, 192, 197, 199 and 206.
(ii) In Jurek v. Texas, 428 U.S. 262 (1976) this Court upheld the statute because it "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death". 428 U.S. at 274 (emphasis added).
(iii) In Proffitt v. Florida, 428 U.S. 242 (1976), the statute was held constitutional in part because the sentencing authority must "focus" on the "circumstances of each indidvidual homicide and individual defendant". Id. at 258.

[27] See:
(i) E.g., Woodson v. North Carolina, 428 U.S. 280 (1976), "A process that accords no significance to relevant facets of the character and record of the individual offender" is unconstitutional because it excludes from consideration the possibility of "compassionate or mitigating factors stemming from the diverse frailties of humankind." Id. at 304.
(ii) Roberts v. Louisiana, 428 U.S. 325 (1976) ("no meaningful opportunity" for "consideration of mitigating factors" presented by "the particular crime or by the attributes of the individual offender".) Id. at 333-34.

> Mitigating circumstances are those circumstances which do not constitute a justification or excuse for the crime, but which may be considered as extenuating or reducing the morale, culpability or blame.

This one sentence falls far short of the careful, adequate and suitable guidance and direction that is constitutionally required, especially in its oblique references to such things as "morale" instead of "moral".

In addition, this Court's decisions - and a fair reading of the Constitution - call for more than a definition of "mitigating". They require that particular mitigating factors relevant in light of the record such as age and others, be called to the jury's specific attention as examples of what they could weigh against the aggravating circumstances which the Court called to the jury's attention.

In Gregg, this Court assumed that such factors would be specifically called to the sentencing authority's attention. Under a fair reading of the constitutional requirements in death cases they clearly should be.

The Georgia statute states flatly that the trial judge "shall include" in his instructions "any mitigating circumstances". Ga. Code Ann. § 27-2534.1. This Court in upholding the Georgia scheme, repeatedly assumed that that would and should be done. 428 U.S. at 164, 192, 193, 194 n.44,[28] 197. Indeed, in one of the many passages which state that the jury's attention must be "focused on the characteristics of the person who committed the crime" (point A above), this Court gave examples of what it

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[28] In the body of the opinion the court rebutted the contention that standards to guide a jury's discretion could not be formulated by referencing the Model Penal Code's listing of the "main circumstances" of mitigation and aggravation which "should be weighed and weighed against each other."

expected the jury's attention to be "focused" upon. Those included factors present in this case - i.e., "any special facts about this defendant that mitigate against imposing capital punishment (e.g., his youth...)" Id., at 197.[29]

C. The Jury Also was not Informed that it Should Weigh "Mitigating" Circumstances Against Aggravating Circumstances.

Apart from not defining the legalism "mitigating" for the jury or providing particularized examples, the jury instructions are also constitutionally deficient in that the jury was not specifically informed that it should weigh mitigating against aggravating circumstances, 428 U.S. at 258 - 251, 258. Similarly, in Jurek the question which a jury must answer before imposing the death sentence necessarily requires such balancing. This Court in Coker also assumed such an instruction was required, 433 U.S. at 89-91.

While a particular form of words may not constitutionally be required, surely it is not constitutional to have the jury totally at sea as it was left here.

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[29] That focus upon mitigating circumstances can make a life or death difference is evident from the following analysis of the pool of cases available to the Supreme Court of Georgia for comparison purposes at the end of 1977:

(i) 36 of the 48 offenders for whom either youth, or lack of a prior criminal record was reported as a mitigating factor by the trial judge (where the death penalty was imposed), or by the court's assistance (where it was not), received life sentences.

(ii) The two offenders for whom both youth and no prior record were reported received life sentences (despite the fact that in both cases (Sanders v. State, 235 Ga. 425, 219 S.E. 2d (1976) and Stoval v. State, 236 Ga. 840, 225 S.E.2d 292 (1976) the offenders were found guilty of brutal murders.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Georgia.

WOODS, BRYAN & THOMAS
A Professional Association

By: Larry D. Woods

121 17th Avenue South
Nashville, TN 37203
615/259-4366

November 21, 1980

In the Supreme Court of Georgia

Decided:
SEP 24 1980

34193. DAVIS v. STATE
34289. SPRAGGINS v. STATE

BOWLES, Justice.

The United States Supreme Court vacated the death sentences in the companion cases of Davis v. State, 242 Ga. 901 (242 SE2d 443) (1979) and Spraggins v. State, 243 Ga. 73 (252 SE2d 620) (1979) and remanded both cases for further consideration in light of Godfrey v. Georgia, 446 U . S. _____ (1980), Davis v. Georgia, ___U. S. _____ # 78-6891 (May 27, 1980), Spraggins v. Georgia, ___ U. S. _____ # 78-5032 (May 27, 1980).

Pursuant to the mandate of the Supreme Court of the United States we have considered both appellant Spraggins' sentence of death which rests upon Code Ann. § 27-2534.1 (b)(7) and Davis' sentence of death which rests partially upon Code Ann. § 27-2534.1 (b)(7).[1/] We find material differences between Godfrey and the

1/ While in Spraggins v. State the jury found as the sole aggravating circumstance Code Ann. § 27-2534.1(b)(7), in Davis v. State the jury found two aggravating circumstances, Code Ann. §27-2534.1 (b)(2) and Code Ann. § 27-2534.1(b)(7). In Godfrey, the court was concerned with a sentence of death resting exclusively on Code Ann. § 27-2534.1(b)(7). Godfrey v. Georgia, 446 U. S. _____ (1980). Therefore, under our decisions, the death penalty in Davis v. State, may be upheld upon Code Ann. § 27-2534.1(b)(2). Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979); Burger v. State 245 Ga. 458 (265 SE2d 296) (1980). Dampier v. State, addendum, supra.

cases under review which distinguish this murder from the murder in Godfrey and from other "ordinary murders" for which the death penalty is not appropriate. See generally, Hance v. State, _____ Ga. _____ (_____SE2d_____) Case No. 26012, decided June 24, 1980, Dampier v. State, addendum, 245 Ga. 882 (_____SE2d_____) (1980.

Unlike the murder in Godfrey, death was not instantaneous, the victim was not related to either defendant, and the victim was in no way threatening nor hostile to the defendants. Both defendants had planned to rob the victim. Thereafter the defendants fled and made every effort to conceal their crimes.

Code Ann. § 27-2534.1(b)(7) provides in pertinent part: "The offense of murder...was outrageously vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. In Davis v. State, supra, and Spraggins v. State, supra, we held that the jury's finding beyond a reasonable doubt that the "murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind of the defendant or aggravated battery to the victim" was supported by the evidence.

The evidence shows that the victim was raped and killed as part of a robbery scheme. The victim died from loss of blood.

She had been beaten about the face and had been repeatedly stabbed, slashed and cut. Her throat was cut and the trachea was almost severed. She had been partially disembowelled. Death was not instantaneous but was prolonged. Spraggins v. State, 240 Ga. 759 (243 SE2d 20) (1978).

The victim was found with her sweater open, her slip pulled up and her pantyhose and panties pulled down. Forensic evidence established that there could have been manipulation of the victim's sexual organs. Bruises were present on her thigh and near the vaginal opening. There was a tear in the vaginal wall and hemorrhaging around the urethra.

Torture occurs when the victim is subjected to serious physical abuse before death. Godfrey v. Georgia, supra; Hance v. State, supra. Serious sexual abuse may be found to constitute serious physical abuse, House v. State, 232 Ga. 140 (205 SE2d 217) (1974); Hance v. State, supra. A defendant who tortures the victim before killing the victim can be found to have a depraved mind.

A defendant who mutilates or seriously disfigures the victim's body after death, or who commits a sex act upon the victim's body

after death may be found to have a depraved mind and such acts would be sufficient to show depravity of mind of the defendant within the meaning of Code Ann. § 27-2534.1(b)(7). Hance v. State, supra.

Accordingly, this court holds that juries in both Spraggins v. State, supra, and Davis v. State, supra, were authorized to find, consistently with the United States Supreme Court's holding in Godfrey, that beyond a reasonable doubt the murder of the victim was of the type universally condemned by civilized society as "outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind." See Burger v. State 245 Ga. 458 (265 SE2d 296) (1980); Stevens v. State, 245 Ga. 583 (266 SE2d 194) (1980).

Judgment imposing the death penalty in each case reaffirmed. All the Justices concur.

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(615) 860-4200

June 20, 1980

Clerk
Supreme Court of Georgia
506 State Judicial Building
Atlanta, GA 30334

Re: Freddie Davis v. State of Georgia

Dear Sir or Madam:

I would appreciate your filing the enclosed appellant's motion for full briefing and for oral argument on remand to this court in the above case.

Sincerely yours,

Larry D. Woods

LDW/dj

Enclosure

IN THE SUPREME COURT OF GEORGIA

| | | |
|---|---|---|
| FREDDIE DAVIS, Appellant, | ) | |
| vs. | ) | No. |
| STATE OF GEORGIA, Appellee. | ) | |

APPELLANT'S MOTION FOR FULL BRIEFING AND FOR ORAL ARGUMENT ON REMAND TO THIS COURT

Larry D. Woods

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A Professional Association
121 17th Avenue South
Nashville, Tennessee 37203
615/259-4366

ATTORNEY FOR APPELLANT

IN THE SUPREME COURT OF GEORGIA

| | | |
|---|---|---|
| FREDDIE DAVIS, Appellant, | ) | |
| vs. | ) | No. |
| STATE OF GEORGIA, Appellee. | ) | |

APPELLANT'S MOTION FOR FULL BRIEFING AND FOR TRIAL ARGUMENT ON REMAND TO THIS COURT

Appellant, Freddie Davis, by his undersigned counsel moves this court for full briefing and for oral argument of the issues raised by the vaction of his sentence of death ordered by the Supreme Court of the United States and the remand of his case "for reconsideration in light of Godfrey v. Georgia, "_____ U.S. _____, 48 U.S.L. Week 4541 (U.S., May 20, 1980) (78-6899).

Appellant was convicted along with Eddie Spraggins of rape and murder and was sentenced to death for the murder conviction. This Court affirmed the conviction in 1978 but vacated and reversed the imposition of the sentence of death as a result of inadequate jury instructions.

At appellant's first sentencing trial, the state had alleged only the aggravating circumstance of "commission of an additional capital felony, to wit, the rape of Frances Coe" and on that basis, the jury had recommended a death verdict. After reversal of the death sentence on direct appeal in Davis v. State, 240 Ga. 763, 243 S.E.2d 12 (1978), at the new sentencing trial,

the state added the allegation of an aggravating circumstance that the offense was "outrageous, wantonly vile, inhuman and involved torture and deprivety of mind...and aggravated battery...". The same evidence and the same witnesses were presented at the second sentencing trial as at the first trial. The re-sentencing jury "recommended" death and petitioner was sentenced to death. This Court affirmed the sentence and a timely petition for the writ of certiorari was filed in the Supreme Court of the United States on June 21, 1979.

On May 27, 1980, the Supreme Court of the United States issued the following order in Davis v. Georgia, 48 U.S.L. Week 3767 (U.S. May 27, 1980):

> The motions of petitioners for leave to proceed in forma pauperis and the petitions for writs of certiorari are granted. The judgments are vacated insofar as they leave undisturbed the death penalties imposed and the cases are remanded to the Supreme Court of Georgia for further consideration in light of Godfrey v. Georgia, 446 U.S. ____ (1980).
>
> This case presents several important issues on remand:
>
> 1. The scope of the holding in Godfrey v. Georgia, supra;
> 2. The application of the (b) (7) aggravating circumstance to the facts of appellant's case;
> 3. The effect of possible mis-application of the (b) (7) circumstances on those cases in which two or more aggravating circumstances have been found by the trial jury; and
> 4. The scope of the appellate review process in the proportionality of the death sentence cases.

WHEREFORE, appellant urges this Court to permit him to fully brief and argue orally these and any other issues presented on remand, on a schedule to be established by the Court, in order

to assist the Court in resolution of these issues which directly effect appellant's sentence.

Respectfully submitted,

WOODS, BRYAN & THOMAS
A Professional Association

By: Larry D. Woods
Attorney for Appellant

121 17th Avenue South
Nashville, Tennessee 37203
615/259-4366

DATED: June 20, 1980

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing motion on the Attorney General's Office, Supreme Court Building, Atlanta, Georgia by placing same with the United States Post Office, postage pre-paid on this 20th day of June, 1980.

Larry D. Woods

80-5757

IN THE

SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

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FREDDIE F. DAVIS,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

---

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Freddie F. Davis, who is now held in the state penitentiary at Jackson, Georgia, asks leave to file the attached petition for a writ of certiorari to the Supreme Court of Georgia without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The petitioner's affidavit in support of this motion is attached hereto.

WOODS, BRYAN & THOMAS
A Professional Association

By: Larry D. Woods
Larry D. Woods

121 17th Avenue South
Nashville, TN 37203
(615) 259-4366

80-5757

IN THE

SUPREME COURT OF THE UNITED STATES

RECEIVED
NOV 24 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

---

FREDDIE F. DAVIS,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

---

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Freddie Davis, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty, I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I belive that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

I was sentenced to death by a state court in Georgia on a charge of murder and rape and I am presently incarcerated at the state prison in Jackson, Georgia. The present proceeding is an application for the writ of certiorari to the Supreme Court of Georgia which affirmed my conviction and sentencing on direct

appeal and and application for the writ of certiorari to the Supreme Court of Georgia which reimposed the death penalty on me upon remand from this court's decision in Davis v. Georgia, _____ U.S. _____, S. Ct. (May , 1980). This proceeding involves claims that my federal constitutional rights have been violated as set forth in the petition for the writ of certiorari.

Freddie Davis

Duly witnessed and sworn to
before me, a notary public
this 6 day of October, 1980.

Notary Public

My Commission Expires:
Notary Public, Lanier Co., Ga.
My Commission Expires SEPT. 20, 198-

NO. 80-5757

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

FREDDIE F. DAVIS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

# BRIEF IN OPPOSITION FOR THE RESPONDENT

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## QUESTIONS PRESENTED

1.

Whether the Supreme Court of Georgia employed the proper procedures on remand from this Court and properly reaffirmed Petitioner's death sentence.

2.

Whether the application of Ga. Code Ann. § 27-2534.1(b)(7) was properly limited in the instant case.

3.

Whether the submission of an additional statutory aggravating circumstance to the jury on a new sentencing trial constitutes double jeopardy.

4.

Whether the jury instructions during the new sentencing trial properly explained mitigation to the jurors.

NO. 80-5757

IN THE

SUPREME COURT OF GEORGIA

OCTOBER TERM, 1980

FREDDIE F. DAVIS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

# BRIEF IN OPPOSITION FOR THE RESPONDENT

## PART ONE

## STATEMENT OF THE CASE

Petitioner, Freddie Davis, was indicted in Meriwether County, Georgia, for the rape and murder of Frances Coe. Petitioner was tried by a jury and found guilty of both offenses. At the initial trial, Petitioner was sentenced to death for the offense of murder and life for rape.

On his first direct appeal to the Supreme Court of Georgia, Petitioner's convictions for murder and rape, as well as the life sentence for rape were affirmed. Davis v. Georgia, 240 Ga. 763, 243 S.E.2d 12 (1978). The Supreme Court of Georgia determined at that time that the trial court's

sentencing instructions did not fully explain to the jury that they could recommend a life sentence even though aggravating circumstances did exist and did not explain to the jury that mitigating circumstances could be considered. Thus, the Supreme Court of Georgia reversed the death penalty for the offense of murder and ordered a new trial on the issue of punishment.

A new jury was selected in Meriwether County and the State presented the same evidence as had been presented in the original trial. At this trial, the State sought the death penalty based on Ga. Code Ann. § 27-2534.1(b)(2) and (7).[1] The jury once again imposed the death penalty and found that both statutory aggravating circumstances existed beyond a reasonable doubt.

The case was again presented to the Supreme Court of Georgia on direct appeal from the resentencing hearing. The Supreme Court of Georgia considered the sentence and affirmed the trial court. Davis v. State, 242 Ga. 901, 252 S.E.2d 443 (1979). Petitioner subsequently filed a petition for a writ of certiorari in this Court. On May 27, 1980, this Court ordered that the judgment of the Georgia Supreme Court be vacated insofar as it left the death penalty undisturbed and remanded the case to the Supreme Court for further consideration in light of Godfrey v. Georgia, 446 U.S. ___, 100 S.Ct. 1759 (1980).

On remand, the Supreme Court of Georgia again affirmed Petitioner's death sentence. The Court noted that under the decisions of the Supreme Court of Georgia, the death sentence could be upheld upon the finding of the second aggravating circumstance. The Court then found that there was sufficient

1/ At the Petitioner's original trial, the State had only sought to impose the death penalty based on Ga. Code Ann. § 27-2534.1(b)(2).

evidence to support a finding beyond a reasonable doubt of the seventh aggravating circumstance. Davis v. State, 246 Ga. 432, _ S.E.2d _ (1980).[2]

Petitioner has filed the instant petition for a writ of certiorari in this Court challenging the resentencing trial conducted by the trial court as well as the decision of the Supreme Court of Georgia on remand.

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2/ Petitioner's co-defendant, Eddie Spraggins, also has a petition for certiorari pending in this Court at this time. As Spraggins' case has followed a similar course as the instant case, see Spraggins v. State, 240 Ga. 759, 243 S.E.2d 20 (1978); Spraggins v. State, 243 Ga. 73, 252 S.E.2d 620 (1979); Spraggins v. State, 246 Ga. 432, _ S.E.2d _ (1980).

## PART TWO

## REASONS FOR NOT GRANTING THE WRIT

### I.

### THE SUPREME COURT OF GEORGIA APPLIED PROPER AND CONSTITUTIONAL PROCEDURES IN CONSIDERING PETITIONER'S CASE ON REMAND FROM THIS COURT.

A. The Supreme Court Of Georgia Was Authorized To Reaffirm Petitioner's Death Sentence On Remand From This Court.

Petitioner challenges before this Court the procedures used by the Supreme Court of Georgia in conducting its review on remand from this Court. Petitioner specifically asserts that the Supreme Court of Georgia should have ordered a new jury trial on the issue of Petitioner's sentence and that the Supreme Court was not authorized to act as a de novo sentencing authority.

Petitioner's view of the decisions of this Court leading up to the instant case does not support the argument made. On the review of Petitioner's death sentence after the resentencing hearing was conducted in Meriwether County, Georgia, the Supreme Court of Georgia considered the imposition of the death penalty as required by Georgia law. Ga. Code Ann. § 27-2537. Under this provision, the Court is authorized, indeed directed, to conduct an appellate review of the sentence imposed by the trial court. The Supreme Court must determine the following:

(1) Whether the death penalty was imposed under the influence of passion, prejudice or any other arbitrary factor;

(2) Whether the evidence supports the aggravating circumstance or circumstances;

(3) Whether the death penalty is excessive or disproportionate considering the crime and the defendant.

The Court is then authorized, among other alternatives, to affirm the sentence of death. Ga. Code Ann. § 27-2537(e)(1).

This Court is presently considering the review by the Supreme Court of Georgia of the most recent death sentence imposed upon the Petitioner and the Supreme Court's decision on remand.[2] In considering the aggravating circumstances, the Court stated, "Both of the statutory aggravating circumstances are supported by the evidence." Davis, supra, 242 Ga. at 908. No detailed examination of the aggravating circumstances was shown in the opinion of the Court.

On the first petition for a writ of certiorari in this Court, the judgment of the Supreme Court of Georgia was vacated concerning the death penalty. This Court did not reverse the sentence of the trial court, but merely remanded the case for additional review by the Supreme Court of Georgia. Therefore, on remand, the Supreme Court was only conducting its appellate review under Ga. Code Ann. § 27-2537. The Court did not reimpose the death sentence, but merely reaffirmed the death penalty previously imposed by the Superior Court of Meriwether County, Georgia. Thus, instead of avoiding the issue, as alleged by Petitioner, the Supreme Court properly

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2/ References in this brief to Petitioner's sentencing and death penalty are references to the sentence imposed by the trial court during a resentencing hearing after the Supreme Court had reversed the first death penalty.

elaborated on its appellate review as authorized by Georgia law.

Petitioner further asserts that the decision by the Supreme Court of Georgia was improper because the jury did not have the benefit of the decision by this Court in Godfrey v. Georgia, 446 U.S. __,100 S.Ct. 1759 (1980), or limiting instructions. Petitioner cites a portion of the Godfrey decision referring to the fact that "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible or inhuman.'" Godfrey, supra. Petitioner omits the fact that one of the key distinctions in the instant case and in the case of Godfrey, is the actual aggravating circumstance found by the jury. In Godfrey, the jury only found that the offense of murder was outrageously or wantonly vile, horrible or inhuman. Godfrey, supra at 1764. All through the Godfrey case, the prosecutor stated that there was no allegation of torture or an aggravated battery. Furthermore, the report of the trial judge specifically stated that the victim had not been physically harmed or tortured. In the case at bar, the jury found "the offense of murder was committed while the offender was engaged in the commission of an additional capital felony, to-wit: the rape of Frances Coe. The offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim." (R. 23). Thus, in relation to the seventh aggravating circumstance, the jury in the Godfrey case only found the first portion of the code provision, whereas, in the present case, the jury found the entire aggravating circumstance. The finding

by the jury of torture, depravity of mind or aggravated battery is a specific verdict showing restraint on the arbitrary and capricious infliction of the death penalty.

Petitioner asserts that the decision by the Supreme Court of Georgia amounts to speculation that the jury had a constitutional rather than an unconstitutional basis for its decision, citing several cases from this Court, including Stromberg v. California, 283 U.S. 359 (1931). In Stromberg, a general verdict of guilty had been returned. The lower court ruled that although a part of the statute and the jury's charge might be unconstitutional, the verdict could still stand. This Court found that it could not be determined on the face of the record that the Petitioner had not been convicted under an invalid clause, particularly in light of the instructions of the jury. In the instant case, no finding has ever been made that Ga. Code Ann. § 27-2534.1(b)(7) is unconstitutional on its face. When the statute is considered, and found by the jury, as a whole, there is no unconstitutional alternative available. There was no speculation by the Georgia court as to the basis of the jury's finding. The Court performed its statutory duty and determined that the evidence supported the finding of both aggravating circumstances.

Clearly, the Supreme Court of Georgia on remand considered the Petitioner's case "As it was tried and as the issues were determined in the trial court." Cole v. Arkansas, 333 U.S. 196, 201 (1948). Respondent submits that the Supreme Court of Georgia acted within its statutory authority and properly reaffirmed Petitioner's death sentence without ordering a new jury trial on sentencing.

B. The Supreme Court Of Georgia Acted Within Its Authority In Reconsidering Petitioner's Death Sentence Without Receiving Additional Briefs Or Oral Argument from Either Party.

Petitioner asserts that after remand, the Supreme Court of Georgia should have granted his request to file briefs and have oral argument before any additional decision was made. Petitioner also asserts various rights he would have had on remand to the trial court had the Supreme Court chosen to send the case back for a resentencing hearing. The fact remains that Petitioner's case was not remanded to the trial court, but to the Georgia Supreme Court. Clearly, the filing of additional briefs and having additional oral argument would be within the discretion of that Court.

The review conducted by the Georgia Supreme Court was not a resentencing proceeding, but a more detailed review of the death penalty as imposed by the trial court. The Court did nothing more than reconsider its own judgment in light of an intervening decision by this Court. The Petitioner had the automatic review provided by the Georgia statute and had the opportunity to file briefs and have oral argument prior to any decision being made by the Supreme Court. There was no deprivation of a right to a hearing by the Supreme Court's consideration on remand, as Petitioner had previously had a hearing before that Court and had the opportunity to argue concerning the sentencing of the Petitioner. No new evidence existed on remand and no new laws had been enacted for the Court to consider. This Court had only rendered a decision concerning the appellate review of death penalty cases under the seventh

aggravating circumstance. Petitioner again likens the actions of the Supreme Court of Georgia to those of a sentencing authority, but as emphasized by Petitioner, the Court has no authority to impose the death sentence. The Supreme Court only reaffirmed the sentence previously imposed. Questions of briefs and arguments and when additional briefs may be filed are clearly within the province of the rules of the Supreme Court of Georgia and do not rise to the level of a federal question for review by this Court.

C. Even Should This Court Reverse The Seventh Aggravating Circumstance, The Existence Of An Additional Aggravating Circumstance Allows The Sentence To Remain Intact.

The seventh aggravating circumstance is clearly supported by the evidence, but Petitioner still contends that if it is not, the existence of an additional aggravating circumstance does not preserve the death sentence. Respondent submits that the existence of two aggravating circumstances clearly shows that there is no basis for a granting of certiorari.

As previously noted, Petitioner was sentenced to death after a finding by the jury of the statutory aggravating circumstances found in Ga. Code Ann. § 27-2534.1(b)(2) and (7). This Court initially remanded the case in light of its decision in Godfrey, supra, dealing with the seventh aggravating circumstance. On remand, the Supreme Court noted in a footnote that under its decisions, the instant case could be upheld solely on the existence of the second aggravating circumstance. Davis, supra, 246 Ga. at 432.

The law in Georgia is clear on this issue. The Supreme Court of Georgia has held on several occasions that even if the finding of some aggravating circumstances must be set aside, the death penalty will be upheld if one remaining aggravating circumstance exists. Dampier v. State, addendum, 245 Ga. 882, _S.E.2d_ (1980); Burger v. State, 245 Ga. 458, 460-61, 265 S.E.2d 797, cert. denied _U.S._, 100 S.Ct. 2975, rehng. denied, _U.S._, 101 S.Ct. 31 (1980); Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349 (1979), cert. denied _U.S._, 100 S.Ct. 1332 (1980).Furthermore, in denying certiorari in an additional Georgia death penalty case, Justice Stevens noted,

> "The Georgia Supreme Court. . . decided to adhere to its prior position that a death penalty imposed on the basis of a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, will not be set aside simply because one of the aggravating circumstances is vulnerable. . . . The Georgia Supreme Court's position is clear, and . . . I consider it consistent with this Court's decisions."

Westbrook v. Balkcom, __U.S.__, 49 U.S.L.W. 3337 (Nov. 18, 1980) (Stevens, J., concurring). Thus, it is clear what the law in the State of Georgia is as to additional aggravating circumstances.

Respondent thus submits that the remands by this Court do not indicate that a reversal is required when one aggravating circumstance is found to not be supported by the evidence.

Contrary to Petitioner's assertion, this does not present a judgment with an ambiguity as to whether the basis is unconstitutional. Clearly, there is still a constitutional basis for the decision. The elimination of one aggravating circumstance has no effect on the evidence considered by the jury as the jury can consider all facts and circumstances presented at trial in mitigation and aggravation. Even had the jury not been instructed on the seventh aggravating circumstance, it would still know of the nature and extent of the wounds inflicted on the victim.

Petitioner has referred to a decision by the Supreme Court of North Carolina in which an allegedly contrary decision was reached. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979). In Cherry, the jury had determined that the defendant was guilty of felony murder. The trial court had then instructed the jury as to aggravating circumstances and had included the underlying felony as one of the aggravating circumstances that could be used to find the death penalty. The Court determined that when felony murder was found by the jury, the underlying felony could not be considered as an aggravating circumstance. The Court thus concluded that the trial judge erred in even submitting that circumstance to the jury for consideration. In the instant case, there has never been any contention that there was an error in submitting the aggravating circumstance to the jury for its consideration. The main contention has been that the jury's finding was not supported by the evidence. Although Petitioner has vigorously attacked the seventh aggravating circumstance, it has not been found to be unconstitutional at any time. Thus, in light of the evidence presented at trial which indicates torture and aggravated battery, the Court properly

charged the jury on the seventh aggravating circumstance. Thus, unlike the case in Cherry, the jury in the instant case did not have an aggravating circumstance presented to it that was inappropriate for its consideration.

Petitioner also cites to Hicks v. Oklahoma, _U.S._, 100 S.Ct. 2227 (1980), and asserts that this decision shows a violation of fundamental fairness if an additional aggravating circumstance is used to uphold the death penalty. In Hicks, the jury was instructed as to the sentence it was to return based on the habitual offender act then existing in Oklahoma. That particular act was later found to be unconstitutional by the Oklahoma courts. This Court found that the theory that the jury might have still imposed such a sentence because it was in the range of permissible sentences, was too speculative, particularly because under the correct instructions, the jury could impose a minimum of ten years in prison. The instant case is not one in which the jury was told what sentence to impose, nor is it a case in which the jury was improperly instructed. The facts considered by the jury would still be present.

Petitioner makes one final assertion in this regard claiming that the Supreme Court of Georgia reimposed the death penalty relying upon the second aggravating circumstance, that is, that the murder was committed during the commission of another felony, to-wit, rape. Petitioner asserts that this raises a serious question under Coker v. Georgia, 433 U.S. 603 (1977). This allegation is clearly without merit for more than one reason. First of all, the Supreme Court of Georgia did not reimpose the death penalty and did not rely solely on the second aggravating circumstance.

The Supreme Court of Georgia reaffirmed the trial court's finding of the death penalty and merely mentioned that the death penalty could be upheld based on the existence of the additional aggravating circumstance. Secondly, Petitioner's reference to Coker v. Georgia, apparently is alluding to the fact that this Court in Coker ruled that the imposition of the death penalty for the rape of an adult woman was excessive and disproportionate. This Court has never held that a rape cannot be used to serve as an aggravating circumstance to impose the death penalty for murder. In fact, this Court in Coker even noted in a footnote that the Supreme Court of Georgia continues to recognize armed robbery and other specific felonies as capital offenses for the purposes of applying the aggravating circumstance provision of the Georgia Code. Coker, supra at 600, fn. 15. There is clearly no error in using a rape to serve as an aggravating circumstance to justify the imposition of the death penalty for murder.

Respondent asserts that even if the seventh aggravating circumstance were improperly found in the instant case, the existence of an additional aggravating circumstance is sufficient to support the death penalty.

II.

THE SUPREME COURT OF GEORGIA APPLIED GA. CODE ANN. § 27-2534.1(b)(7) IN A CONSTITUTIONAL MANNER IN THE INSTANT CASE.

Petitioner has asserted that the Supreme Court of Georgia has unconstitutionally applied the seventh aggravating circumstance in the instant case by its decision on remand. Respondent asserts that the facts of this case clearly show that the seventh aggravating circumstance is appropriate in the instant case and that the Supreme Court of Georgia properly considered the statute on remand.

Petitioner has asserted that the Supreme Court of Georgia has chosen to interpret the decision of this Court in Godfrey narrowly, and has not followed the teachings of this Court. Petitioner specifically refers to a "rash of affirmances" occurring since the decision of this Court in Godfrey, and states that a number of them are "highly questionable". (Brief of Petitioner at 19). Petitioner has not shown how any of these affirmances were made on questionable grounds. In reality, since this Court's decision in Godfrey, the Supreme Court of Georgia has taken great pains to make its appellate review an elaborate and detailed process by examining each case and the facts of each case very thoroughly.

This Court should particularly note that the Supreme Court of Georgia recently in Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980), went into great detail in defining and explaining the seventh aggravating circumstance. The Court consolidated its earlier opinions and this Court's decision in Godfrey to set out a specific meaning of the the seventh aggravating circumstance for the purposes of appellate review.

In considering Petitioner's death sentence on remand in light of Godfrey, this Court found that the murder in the instant case was clearly distinguishable from those murders for which the death penalty is not appropriate. The Court did specifically contrast the facts in this case from those in Godfrey to show the extreme nature of this crime in comparison to that in Godfrey. In the instant case, the Supreme Court of Georgia noted that death was not instantaneous and that this was not a domestic type of situation. The Court further noted that the evidence showed that the victim had been raped and killed as part of a robbery scheme. "The victim died from loss of blood. She had been beaten about the face and had been repeatedly stabbed, slashed and cut. Her throat was cut and the trachea was almost severed. She had been partially disembowelled. Death was not instantaneous but was prolonged." Davis, supra, 246 Ga. at 433; Spraggins v. State, 240 Ga. 759, 243 S.E.2d 20 (1978). The Court went on to note the evidence indicating that there had been a rape of the victim. The Court then found that the jury was authorized to find, consistently with this Court's holding in Godfrey "that beyond a reasonable doubt, the murder of the victim was of the type universally condemned by civilized society as 'outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind.'" Davis, 246 Ga. at 434.

Clearly under these facts, the application of the seventh aggravating circumstance is appropriate. The Supreme Court of Georgia thoroughly conducted its review on remand in accordance with this Court's holdings in Godfrey and properly determined that the jury had correctly found the existence of the seventh aggravating circumstance beyond a reasonable doubt.

III.

THE ADDITION OF A NEW AGGRAVATING CIRCUMSTANCE ON PETITIONER'S SECOND SENTENCING TRIAL IN MERIWETHER COUNTY DID NOT AMOUNT TO DOUBLE JEOPARDY.

After Petitioner's death sentence was reversed by the Supreme Court of Georgia on his first direct appeal, Petitioner was returned to the Superior Court of Meriwether County for a new trial on sentencing. In the first trial, the District Attorney submitted for the jurors' consideration, the statutory aggravating circumstance that the murder was committed while the Petitioner was engaged in the commission of another capital felony, that being rape. Ga. Code Ann. § 27-2534.1(b). At the resentencing trial, the seventh statutory aggravating circumstance was also included for the jurors' consideration. Petitioner argues that this constitutes double jeopardy and that the State should be precluded from adding an additional aggravating circumstance at a subsequent trial for resentencing. Petitioner also attempts to assert that this is in some manner a vindictive action on the part of the State.

This point was addressed by the Supreme Court of Georgia on its review after the resentencing hearing. The Court found that there was no double jeopardy violation in submitting an additional aggravating circumstance for the jury's consideration at the resentencing trial. The Court cited its prior decision in Redd v. State, 242 Ga. 876, 252 S.E.2d 383 (1979). In Redd, the Supreme Court of Georgia noted that the double jeopardy clauses of both the federal and state constitutions state that no person shall be placed in

jeopardy of life or liberty more than once for the same offense. Code Ann. § 1-805; Ga. Code Ann. § 2-115. "The prohibition is not against being twice punished, but against being twice put in jeopardy". United States v. Ball, 163 U.S. 662, 669 (1896). This Court has also held that the double jeopardy clause of the Fifth Amendment is written in terms of the potential risk of trial and conviction not of punishment. Price v. Georgia, 398 U.S. 323, 326 (1970).

In the decision in Redd, supra, the Supreme Court of Georgia noted that the defendant in that case, as the Petitioner in the instant case, had his conviction affirmed on appeal. The Court further noted that statutory aggravating circumstances are not offenses, but are charged to a jury to assist the jury in deciding whether to impose a life sentence or a death sentence. Redd, supra at 883. It was further noted in the concurring opinion to Redd, that the addition of the statutory aggravating circumstance did not put the jury in a position of having to compromise. As the jury could only impose either a death sentence or a life sentence, there was no compromise available to the jury.

It cannot be said that the submission of a second aggravating circumstance at the resentencing trial was to have a chilling effect as a result of the Petitioner having earlier exercised his appellate rights. The Petitioner in the State of Georgia in a death penalty case is entitled as a matter of law to an automatic appeal from any conviction in which he receives the death penalty. Ga. Code Ann. § 27-2537(a). Furthermore, it could hardly be considered a chilling effect as the punishment that the jury could impose

was no greater than the punishment received by the Petitioner at his first trial.

There is also no evidence to indicate that the District Attorney's action in submitting an additional statutory aggravating circumstance constituted vindictiveness. See North Carolina v. Pearce, 395 U.S. 711 (1969). The Petitioner did not receive a greater sentence on retrial, but received the same sentence he had earlier received. Thus, his retrial did not subject him to a greater punishment than that imposed at his first trial. Furthermore, because the jurors were not called upon to consider the additional statutory aggravating circumstance in the first trial, the submission of the additional circumstance on the second trial does not constitute double jeopardy. See Price v. Georgia, supra; Bordenkircher v. Hayes, 434 U.S. 357 (1978).

Petitioner has attempted to imply that evidence was introduced at the second sentencing hearing which would not have been introduced had the seventh aggravating circumstance not been added. This ignores the fact that under Georgia law, all evidence introduced at trial may be considered in aggravation or in mitigation of punishment. Thus, all evidence that had been admitted at the trial, including the evidence relating to the nature and extent of the victim's injuries, was admissible at the sentencing hearing.

Respondent asserts that the addition of an aggravating circumstance did not constitute double jeopardy as no additional evidence was introduced and as the jury had not previously had the chance to make a determination as to that aggravating circumstance. Furthermore, no vindictiveness

is shown because the Petitioner could only have received the same sentence as he received at his first trial or a lesser one. The addition of an aggravating circumstance does not increase the possible punishment. Thus, Respondent submits that no federal question is presented by this allegation.

IV.

THE INSTRUCTIONS GIVEN TO THE JURY AT PETITIONER'S RESENTENCING HEARING CLEARLY FALL WITHIN THE CONSTITUTIONAL GUIDELINES SET FORTH BY THIS COURT.

Petitioner has enumerated several allegations relating to the charge of the trial court at his resentencing hearing. All of these allegations will be dealt with under this heading by the Respondent.

The Petitioner's first death sentence was specifically set aside because the trial judge failed to inform the jurors that even if they found the existence of a statutory aggravating circumstance, they could impose a life sentence, and further, because the jury had not been instructed that they could consider mitigating circumstances in determining whether or not to impose the death penalty. Davis, supra, 240 Ga. at 767. On the resentencing hearing, the trial court charged, "It is now your duty to determine within the limits prescribed by law the penalty that shall be imposed for that offense." (ST. 353).[3] The Court then charged the jury that they were authorized to consider all of the evidence received in open court. (ST. 354). The Court further charged that the jury was authorized to consider all the facts and circumstances of the case. (ST. 355).

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3/ ST. refers to the transcript of Petitioner's resentencing trial.

The Court then charged as follows:

"Ladies and Gentlemen of the jury, in reaching your verdict, you are authorized to consider all of the facts and circumstances, if you find there be any, in mitigation of punishment. In determining whether mitigating circumstances exist, you are authorized to consider all of the evidence produced by the State and the defendant throughout this trial.

Mitigating circumstances are those circumstances which do not constitute a justification or excuse for the crime, but which may be considered as extenuating or reducing the moraIe [sic], culpability or blame.

In reaching this verdict, you are not required to find mitigating circumstances in order to recommend a sentence of life imprisonment. You may recommend a sentence of life imprisonment regardless of whether or not you believe mitigating circumstances exist in this case.

Ladies and Gentlemen of the jury, I charge you that before you would be authorized to find a verdict fixing a sentence of death by electrocution, you must find evidence of statutory aggravating circumstances as I will define to you later

in this charge, sufficient to authorize the supreme penalty of law."

(ST. 355-6).

The Court then proceeded to charge the jury on aggravating circumstances. The Court further charged:

> "The law provides that when a party is tried by a jury, and is convicted of an offense that may be punishable by death, the sentence of death shall not be imposed, unless the jury's verdict includes the finding of at least one aggravating statutory circumstance and a recommendation that the death sentence be imposed. When a statutory aggravating circumstance is found and a recommendation of death is made, the Court shall sentence the defendant to death."

(ST. 356). The State then proceeded to explain the different aggravating circumstances that were available to the jury for its consideration in this case.

The Petitioner's first allegation concerning this charge is that the jury was not told that its decision must include a focus on the particular characteristics of the Petitioner. Petitioner asserts this conflicts with this Court's decisions in Gregg v. Georgia, 428 U.S. 153 (1976), Woodson v. North Carolina, 428 U.S. 280 (1976) and others. In Jurek v. Texas, 428 U.S. 262 (1976), this Court found that a jury must be allowed to consider why the death penalty should be imposed or why it should not be imposed.

The Court went on to cite its decision in Gregg, supra.

> "In Gregg v. Georgia, we today hold constitutionally valid a capital-sentencing system that directs the jury to consider any mitigating factors and in Proffitt v. Florida, we likewise hold constitutional a system that directs the judge and advisory jury to consider certain enumerated mitigating circumstances."

Id. at 271-2. The Court noted that under Texas law, the jury may be asked to consider whatever evidence of mitigating circumstances the defense could bring before it. The Court then went on to state that the Texas statute as those in Georgia and Florida did have procedural guidelines and did focus the jury's objective consideration to the circumstances of the offense and the offender. The Court went on to note that "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." Jurek at 276. The Court found that the Texas statute authorized the defendant to bring whatever information he could relating to mitigating circumstances before the jury and that this guaranteed that the jury would have adequate guidance to perform its sentencing function.

At no time has this Court specifically required that mitigating circumstances be enumerated or that a jury be specifically told that it must consider all characteristics of an individual defendant or of the crime. No precise words have been set forth by this Court as being mandatory in this matter. Clearly, the instructions given by the trial court to the jury authorized them to consider anything that might be presented to them that they would consider mitigating. This is clearly sufficient under the rulings of this Court.

Petitioner further urges that the term mitigating was not sufficiently defined for the jury and that the Court did not provide any examples for the jury. Respondent asserts that no decisions by this Court have required a more thorough definition of mitigation, nor have they required particular mitigating factors to be set forth for the jury by the Court.

The Supreme Court of Georgia has considered this allegation on several occasions and found that mitigating circumstances are not required to be singled out under Georgia law, referring to Ga. Code Ann. § 26-3102. "Mitigating circumstances are not a predicate for a recommendation of a life sentence, though statutory aggravating circumstances are required for a death sentence." Thomas v. State, 240 Ga. 393, 401, 242 S.E.2d 1 (1977). In Spivey v. State, 241 Ga. 477, 479, 246 S.E.2d 288 (1978), the Supreme Court of Georgia held,

> "The reason behind the ruling was that Georgia law no where defines mitigating circumstances. 'Mitigating circumstances' are referred to in Code Ann. § 26-2534.1(b) and § 26-2503, but the statutes are wholly silent on what they shall be . . . . The conclusion is inescapable that the legislature meant to empower the jury to consider as mitigating anything they found to be mitigating without limitation or definition. This is a constitutionally valid procedure. Thus, the instant

case clearly falls within those prior decisions of the Supreme Court of Georgia and clearly follows Georgia law in not referring to any specific mitigating circumstances and in not giving a more elaborate definition of mitigation."

The trial court's instruction on mitigation in the instant case was clearly sufficient. The term mitigating circumstances was defined and thus, no further elaboration was required because the word mitigating is a common term within a juror's understanding. See United States v. Beasley, 519 F.2d 233 (5th Cir. 1975), rehng. denied, 522 F.2d 1280 (5th Cir. 1976).

Petitioner also asserts that the jury was not informed that it should weigh mitigating circumstances against aggravating circumstances. Petitioner specifically refers to the decision in Jurek v. Texas, supra.

Jurek v. Texas required such an instruction because the statutory scheme in Texas required the jury to answer questions concerning whether the mitigating circumstances outweighed the aggravating circumstances. Under the Georgia statutory scheme, mitigating circumstances do not have to outweigh aggravating circumstances. The jury may determine that a life sentence should be imposed without ever finding any mitigation whatsoever. Clearly, under the Georgia sentencing scheme and under the constitutional guidelines of this Court, no such specific instruction was required.

Respondent asserts that the instructions by the trial court fully explained mitigating circumstances to the jury. The jury was instructed to consider anything in mitigation and that they could vote to impose a life sentence even without mitigating circumstances. Thus, the instructions by the Court at Petitioner's second sentencing hearing were proper.

## CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Freddie F. Davis.

Respectfully submitted,

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